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No. 85-139

In the Supreme Court of the United States

OCTOBER TERM, 1985

PENNZOIL COMPANY, ET AL., PETITIONERS

v.

ASSOCIATED GAS DISTRIBUTORS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in treating a mandamus petition as if it were a petition for review of an order of the Federal Energy Regulatory Commission.

2. Whether the court of appeals erred in setting aside that order of the Federal Energy Regulatory Commission, which permitted natural gas producers to offset amounts owed them by pipelines when making refunds to the pipelines.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 756 F.2d 166 (D.C. Cir. 1985). The orders denying rehearing (Pet. App. 132a-135a) and suggestions for rehearing en banc (Pet. App. 136a) are unreported. The orders of the Federal Energy Regulatory Commission (Pet. App. 16a-80a and 81a-126a) are reported at 49 Fed. Reg. 37735 (1984) and 49 Fed. Reg. 46353 (1984).

JURISDICTION

The judgment of the court of appeals (Pet. App. 130a-131a) was entered on March 5, 1985. Petitions for rehearing and rehearing en banc were denied on May 6, 1985 (Pet. App. 132a-135a) and on May 15, 1985 (Pet. App. 136a), respectively. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 15 U.S.C. 3416(a)(4).

STATEMENT

1. In *Interstate Natural Gas Association of America* v. *FERC*, 716 F.2d 1 (D.C. Cir. 1983), cert. denied, 465 U.S. 1108 (1984) (*INGAA I*), the court of appeals held that the Natural Gas Policy Act of 1978, 15 U.S.C. 3301 *et seq.* (NGPA) required use of the "wet" method of measurement rather than the "dry" method to determine the Btu content of natural gas for the purpose of pricing under Title I of that Act. The upshot of that determination was that the Federal Energy Regulatory Commission's "dry" rule was vacated and natural gas producers were required to make substantial refunds to pipeline companies which, in turn, were required to make refunds to natural gas customers. Accordingly, following issuance of the judgment of the District of Columbia Circuit in *INGAA I*, the Commission, in Order No. 399 (Pet. App. 16a-80a), established procedures under which the producers would make those refunds. In that order, the Commission denied the producers' request that they be permitted to offset amounts owed them by the pipelines under unrelated Commission orders dealing with production-related costs, known as "Section 110 costs." Pet. App. 6a-8a.

The producers sought rehearing. In Order No. 399-A (Pet. App. 81a-126a), the Commission denied rehearing on most issues raised by the producers, but granted rehearing on the offset question. On that issue, the Commission reversed its prior decision and directed the producers to offset the Section 110 (15 U.S.C. 3320), costs owed them against amounts due the pipelines because of the invalidation of the dry rule.[1]

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[1] The Commission adopted the offset procedure because it concluded that it would provide for the timely payment of both the dry rule refunds and the Section 110 costs. The Commission noted that numerous interstate pipelines had not paid the Section 110 costs they owed producers, despite the fact that the order requiring the payment of Section 110 costs ordered that they should commence in March 1983,

Associated Gas Distributors (AGD), contesting the offset procedures adopted in Order No. 399-A, filed for rehearing with the Commission on that issue (Pet. App. 128a). They also filed a petition for mandamus in the District of Columbia Circuit, seeking an order invalidating the offset procedure on the ground that it was inconsistent with the court's mandate in *INGAA I*. Meanwhile, the producers—one day before AGD sought mandamus in the District of Columbia Circuit — filed petitions for review of Order No. 399 and Order No. 399-A in the Fifth Circuit (Pet. App. 9a).

2. Following briefing and oral argument, the panel of the District of Columbia Circuit that had decided *INGAA I* then issued the decision challenged by petitioners. It decided that, in order "not [to] enter the debate over the propriety of resort to mandamus in this case" (Pet. App. 9a), it would treat AGD's mandamus petition as a petition for review. The court then concluded that the offset provision "must be set aside" (*id.* at 11a). The court determined that the offset procedure would only further delay refunds of dry rule overcharges, since the pipelines had appealed the Commission's order regarding Section 110 costs to the Fifth Circuit, which had not issued a decision at that time. The court concluded that further delay was contrary to the teaching of *FPC* v. *Tennessee Gas Transmission Co.*, 371

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and that, although the order had been appealed to the Fifth Circuit, the order had not been stayed. The Commission also concluded that the offset would come close to matching the customers who were entitled to dry rule refunds with those who caused the incurrence of the Section 110 costs. In addition, the Commission noted that, commencing January 1, 1985, the price of a large portion of flowing natural gas would be deregulated at the wellhead. It was the Commission's opinion that, by utilizing the offset mechanism, most producers and pipelines could complete the refund process prior to the commencement of deregulation, thus leaving the market price for the deregulated gas undistorted by past costs. Pet. App. 85a-109a.

U.S. 145 (1962), in which the Court held that refunds must be implemented "at the earliest possible moment consistent with due process" (Pet. App. 11a, quoting 371 U.S. at 155).

Judge Scalia issued a concurring opinion. He observed that, irrespective of whether the Section 110 cost orders were still being contested in the Fifth Circuit, if those Section 110 costs were owed, "*the set-off constitutes immediate payment*" (Pet. App. 14a (emphasis in original)).[2] The panel subsequently denied rehearing (*id.* at 132a) and, at that time, Judge Scalia substituted a dissent for his concurrence (*id.* at 133a-135a). In that dissent, he concluded that mandamus was not warranted, since *INGAA I* had merely directed the Commission to vacate its dry rule and the Commission "retain[ed] discretion to determine both the amount and the manner of refund" (Pet. App. 133a). Judge Scalia further concluded that if the mandamus petition was viewed as a petition for review, then the Fifth Circuit would be the proper forum for such review since the first petition for review had been filed there. He reasoned that Congress's intention was to place review of the same order in a single court, not to have piecemeal review of such orders, so that the District of Columbia Circuit should have transferred the case to the Fifth Circuit (*id.* at 133a-134a).

3. A number of relevant events occurred after the District of Columbia Circuit issued its judgment. First, pursuant to the decision of the District of Columbia Circuit, the Commission, on July 18, 1985, granted rehearing of Order No. 399-A. It issued Order No. 399-B (Pet. App. 1b-9b), requiring the producers to refund the dry rule overcharges to the pipelines, without offsetting any Section 110 costs, by August 30, 1985 (Pet. App. 7b). Then, on August 19, 1985,

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[2]Judge Scalia concurred, however, because he concluded that "the agency's action, however well intentioned, constitutes an attempt to increase rates retroactively" (Pet. App. 15a).

Fifth Circuit issued its decision in the Section 110 case, *Texas Eastern Transmission Corp.* v. *FERC*, No. 83-4390. It rejected the pipelines' arguments and largely affirmed the Commission's order (slip op. 33). Finally, on the same day, the Fifth Circuit transferred the petitions for review of Order No. 399 and Order No. 399-A to the District of Columbia Circuit, pursuant to 28 U.S.C. 2112(a), stating that it was doing so "in the interest of justice."

ARGUMENT

Although in our view the District of Columbia Circuit erred procedurally and substantively, there is no reason to believe that its decision will have any effect beyond the unusual circumstances of this case. Therefore, review by this Court is not warranted.

1. As Judge Scalia concluded, the court erred procedurally because it should not have treated the mandamus petition as a petition for review. Moreover, 15 U.S.C. 3416(a)(4) requires review of the Commission's decisions to be based on the record, which was never filed with the District of Columbia Circuit.[3]

Substantively, the offset approach that the Commission adopted in Order No. 399-A was fully consistent with decisions holding that Congress did not specify how refunds were to be computed but rather left that function to the reasoned discretion of the Commission. See, *e.g.*, *Belco Petroleum Co.* v. *FERC*, 589 F.2d 680, 686 (D.C. Cir. 1978). To be sure, the panel majority is correct that this Court's decision in *Tennessee Gas* requires the payment of refunds at the earliest possible moment consistent with due process. But, as Judge Scalia stated in his initial concurrence (Pet. App. 14a), if the Section 110 costs were in fact

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[3]Section 3416(a)(4) states that "the Commission shall file with the court the record upon which the order complained of was entered, as provided by section 2112 of Title 28."

owed to producers, "the set-off constitutes immediate payment." Therefore, permitting the producers to offset Section 110 costs in making refunds was not inconsistent with *Tennessee Gas*.

2. Nevertheless, this peculiar case does not warrant review by this Court. The conditions that led the court of appeals to err procedurally are not common. In this case, the Commission issued a decision following a judgment by a court of appeals that arguably offended the court's mandate, but the decision was appealed to another court of appeals. Contrary to petitioner's claim, we think it unlikely that this factual pattern is likely to recur frequently.

Moreover, since the Fifth Circuit has decided that petitions for review of the Commission's dry rule orders ought to be considered by the District of Columbia Circuit, the District of Columbia Circuit's decision to treat the mandamus petition as a petition for review appears to be harmless error. An order by this Court requiring the District of Columbia Circuit to vacate its decision and transfer the case to the Fifth Circuit, which would then presumably transfer it back to the District of Columbia Circuit, would be a useless exercise. Therefore, even if the procedural problems presented by this case were sure to arise again, it would seem preferable to wait for another case.

Substantively, we do not think that the question whether an offset is an immediate payment — or whether, as the court of appeals held, *Tennessee Gas* requires immediate cash refunds — requires the Court's attention at this time. There is no conflict on this issue. Moreover, since the Commission ordered the producers to pay the dry rule overcharges by August 30, and no stay was obtained, the refunds should already have been made without offset. Finally, given the Fifth Circuit's recent decision in *Texas Eastern* affirming outstanding Commission orders requiring payment of Section 110 costs, such payments should

occur in the near future. In short, the producers and the pipelines should have squared their accounts by the time this Court could resolve the issue, and there is no pressing need for review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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*Acting Solicitor General Fried is disqualified in this case.

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